United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

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AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, Petitioner, v. CIVIL AERONAUTICS BOARD, Respondent.	No. 75-4049
CAPTAIN EUGENE L. COCHRAN, Petitioner, v. CIVIL AERONAUTICS BOARD, Respondent.	No. 75-4055

BRIEF OF AVIATION CONSUMER ACTION PROJECT, JAMES WM. NOLL, MARGARET SONJA NOLL, PATRICIA KENNEDY, AND RALPH NADER, AMICI CURIAE

Reuben B. Robertson III

2000 P Street, N.W., Suite 700
Washington, D.C. 20036
(202) 785-3704

Attorney for Aviation Consumer Action Project, et al., Amici Curiae

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This case raises procedural and substantive issues concerning actions of the Civil Aeronautics Board, affecting the common carrier safety and operational responsibilities of federally certificated air carriers, that are of profound importance to airline passengers as well as the carriers, their employees, and the public at large. ALPA's petition for review of CAB Order 75-2-127 was filed on March 13, 1975, together with its motion for stay and motion for expedited consideration.

On March 25, 1975, the Court stayed Order 75-2-127 pending appeal, enjoined the Board, pending the completion of judicial review, from interfering with the air carrier's right to refuse transportation of property which in their opinion may be inimical to safe operation, and established an expedited schedule for briefing and argument on the merits.

This brief is respectfully filed by the Aviation Consumer Action Project (ACAP), James Wm. Noll, Margaret Sonja Noll, Patricia Kennedy, and Ralph Nader, amici curiae, pursuant to leave granted by order of this Court dated March 24, 1975. ACAP is a national non-profit consumer rights organization, headquartered and incorporated in the District of Columbia, which specializes in the advocacy of airline passenger safety, health and economic protection. It has been an active proponent of consumer interests in air transportation before the CAB as well as other agencies and courts. ACAP appears as amicus herein both on its own behalf and on behalf of its supporters and employees who are users of scheduled airline passenger services in the United States. The individual amici are frequent airline passengers who assert a right to use federally certificated air carrier passenger services without being exposed to the risks of hazardous cargoes aboard passenger-carrying aircraft. As a result of a recent incident involving a shipment of hazardous cargo, Dr. and Mrs. Noll have also been personally exposed to excessive radiation while travelling as passengers on a commercial airline flight, and wish to reduce the risks of any

further such experiences for themselves or other members of the public.

STATEMENT OF THE CASE

Few people are aware that, until recently, the airlines have routinely transported a wide variety of hazardous materials on passenger flights. Radioactive isotopes, chemicals, acids and oxidizing materials, live germ viruses and even explosives have been carried, frequently in large quantities, a few feet beneath the seats of unsuspecting passengers. Recent investigations by public and private organizations have disclosed that effective regulatory control over the air transportation of hazardous cargoes has been virtually non-existent, and that the associated safety problems are serious indeed.* These and other reports demonstrate clearly that the shipment of hazardous cargoes by air presents an extremely serious safety problem for passengers, crewmembers,

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* See, e.g., Hearings on Transportation of Hazardous Materials, before a Subcommittee of the House Committee on Government Operations, 92d Cong., 1st and 2d Sess. (1971 and 1972); Hearings on Transportation of Hazardous Materials by Air, before the Government Activities Subcommittee of the House Committee on Government Operations, 93d Cong., 1st Sess. (1973); Hearings on FAA Regulation Concerning Hazardous Air Cargo, before the Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce, 93d Cong., 2d Sess. (1974); Air Safety: Selected Review of FAA Performance, Report by Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce, 93d Cong., 2d Sess., pp. 179-194 (1974); United States Atomic Energy Commission, Recommendations for Revising Regulations Governing the Transportation of Radioactive Material in Passenger Aircraft, submitted to the Federal Aviation Administration, July 1974; National Transportation Safety Board, Aircraft Accident Report 74-16, Pan American World Airways, crash at Boston, Massachusetts on November 3, 1973 (1974); Hearings on Transportation of Hazardous Materials, before the Senate Commerce Committee, 93d Cong., 2d Sess. (1974); S. Rep. No. 93-1192, Senate Commerce Committee, 93d Cong., 2d Sess. (1974).

and the general public, as well as a substantial exposure of the carriers to potential liability arising out of accidents related to hazardous shipments.

In response to growing apprehension, concern and pressure from their employees and the public, various airlines in late 1974 and early 1975 began reassessing their acceptance and handling of hazardous materials. Some carriers concluded that they were unable to handle hazardous materials as air cargo with sufficient protection for their crews, passengers and the public safety. The significance of this judgment was underscored when, on January 28, 1975 the Federal Aviation Administration amended its regulations on air transportation of dangerous articles, 14 CFR § 103.3, to eliminate a provision that the carrier "may rely on the shipper's statement as prima facie evidence that the shipment complies with" all requirements of the regulations, thus putting onto the carrier's shoulders an enormous independent responsibility to assure compliance. FAA Amendment No. 103-23, 40 F.R. 5140-5141 (February 4, 1975). And on February 1, 1975 ALPA initiated a nation-wide program to increase the safety of air transportation, among other things by banning hazardous materials (except for essential medical supplies) from passenger flights.

A number of major airlines thus determined, in light of the ALPA program, the safety risks involved in their handling of such cargoes in a largely unregulated environment, and their new liability exposure, to restrict their acceptance and carriage of hazardous materials

effective in February, 1975. In accordance with the CAB regulations, 14 CFR Part 228, these carriers duly filed with the Board notices describing their embargoes on such cargoes, generally effective February 1.

On February 28, without prior notice or hearing, the Board issued its Order 75-2-127 which is the subject of this appeal. That order purported to reject the hazardous materials embargoes filed by certain of the carriers. The clear upshot of the Board's action was to require the carriers to forego their own independent judgments as to the safety of carrying hazardous cargoes, and to continue to accept and carry such shipments without restriction. As a result of that order, some if not all of the carriers have indeed resumed their prior practice of transporting all tendered hazardous shipments without asserting an independent safety judgment.

ARGUMENT

I. THE BOARD'S ACTION INTERFERES WITH THE CARRIERS' DUTY TO MAXIMIZE PASSENGER SAFETY.

Passengers are legally entitled to the benefit of the informed, independent judgment of airlines as to the safety of flight. This right derives from the obligation of a common carrier of persons to "exercise the highest degree of care that human judgment and foresight are capable of, to make his passenger's journey safe," Scott v. Eastern Airlines, 399 F.2d 14 (3rd Cir.)(en banc), cert. denied, 393 U.S. 979 (1968).*

* See also, e.g. Fleming v. Delta Airlines, 359 F. Supp. 339, 341 (D.N.Y. 1973); United Air Lines v. Wiener, 335 F.2d 379, 389 (9th Cir. 1964), cert dismissed 379 U.S. 951 (1964); Garrett v. American Airlines, Inc., 332 F.2d 939, 943-944 (5th Cir. 1964); Cattaro v. Northwest Airlines, Inc., 236 F. Supp. 889, 894 (D. Va. 1964).

The Federal Aviation Act expressly recognizes and incorporates the duty of air carriers "to perform their services with the highest possible degree of safety in the public interest," 49 U.S.C. § 1421. Pursuant to that responsibility, the Act expressly authorizes carriers to "refuse transportation of . . . property when, in the opinion of the carrier, such transportation would be inimical to safety of flight," 49 U.S.C. § 1511 (as amended by sec. 204 of the Air Transportation Security Act of 1974, Pub. L. 93-366, 88 Stat. 409). See Williams v. Trans World Airlines, ___ F.2d ___ (2d Cir., No. 74-1469, decided January 10, 1975).

Here the carriers have been alerted to a nation-wide breakdown in the safety regulation of hazardous air shipments. They have seen that dangerous goods carried as airline cargo have resulted in numerous accidents, including personal injury and death. While some of these shipments are improperly packaged--and indeed it appears that the great majority of shippers are completely unfamiliar with the applicable FAA shipping regulations-- others, such as volatile chemicals, compressed gases, lethal compounds of plutonium, are simply unsuitable for air carriage in any event because of the magnitude of the danger in case something goes wrong. The carriers' caution in this area is thoroughly supported by the investigations and findings of Congress, the National Transportation Safety Board and other government agencies (including the FAA itself), as well as private organizations.

The judgment not to accept certain hazardous materials for

carriage on passenger flights, at least until the regulatory situation is improved and the safety of such carriage can be demonstrated, is precisely the kind of protection to which passengers are entitled under the common law and federal statute. Yet the Civil Aeronautics Board has in effect commanded the carriers to abandon their safety embargo programs and to forego their independent judgment not to accept hazardous shipments for placement aboard passenger flights. This industry-wide action necessarily increases the risk of harm to airline passengers throughout the nation, by interfering with the best judgment of air carriers and their duty to maximize the safety of flight.

The Board's action, moreover, flies in the face of an important national policy articulated by Congress only months earlier. The Hazardous Materials Transportation Act, enacted as part of the Transportation Safety Act of 1974 and signed into law by President Ford on January 3, 1975, was a response to the national emergency which had arisen because of the breakdown in regulatory controls over the growing volume of dangerous articles shipped by air and other transport modes. Section 102 of that law, 49 U.S.C. § 1801, declares a national policy of improving federal enforcement and regulation in order "to protect the Nation adequately against the risks to life and property which are inherent in the transportation of hazardous materials in Commerce."

The Board apparently misperceives the thrust of this new Act as well as the safety regulations promulgated under the Federal Aviation

Act. Failing to recognize that the federal role is restricted to the establishment of minimum standards of air safety, 49 U.S.C. § 1421, the Board wrongly concludes that FAA has "preempted this area of regulation," and accordingly the carriers may not exceed the safety levels contemplated by the regulations on shipment of hazardous materials. Order 75-3-61, pp. 2-3. In the same vein, the Board views the statutory right of the carriers to refuse to transport property on safety grounds, 49 U.S.C. § 1511, as having been restricted with respect to hazardous materials by the Administrator's promulgation of minimum standards in this area. This approach is utterly devoid of support in law or logic, it reads into the FAA regulations a mandatory maximum on safety that was never intended to be there, it distorts the entire thrust of minimum safety regulation in the Federal Aviation Act, and it intrudes improperly into the domain that was intended by Congress to be left to the carriers in exercising their judgment to improve on the minimum safety levels required by regulation.

No provision of law authorizes the Civil Aeronautics Board to obstruct safety in this manner. Indeed, the Board's action directly contravenes its own statutory mandate, set forth in section 102 of the Federal Aviation Act, 49 U.S.C. § 1302, to consider "the regulation of air transportation in such manner as to . . . assure the highest degree of safety" and "the promotion of safety in air commerce" as two of the central components of the public interest the Board is supposed to serve. The Board, however, has simply washed its hands of its responsibility for safety and neglected to give any consideration to

the maximization of air safety in rejecting the carriers' hazardous materials programs.

II. IN THE CIRCUMSTANCES, THE BOARD LACKS AUTHORITY TO REJECT THE CARRIERS' HAZARDOUS MATERIALS EMBARGOES OR TO COMPEL THE CARRIAGE OF SUCH MATERIALS, WITHOUT AFFORDING NOTICE AND OPPORTUNITY FOR HEARING.

An embargo is "an emergency measure placed in effect because of some disability on the part of the carrier which makes the latter unable properly to perform its duty as a common carrier." Chicago & N.W.Ry. Co. v. Union Packing Co., 373 F. Supp. 734, 736-7 (D. Neb. 1974). As the court there said, "it is the right of a carrier to establish an embargo if circumstances warrant it, and the right of the carrier to determine in the first instance the need of an embargo and the right to place that embargo for the proper conduct of its business are well settled," Id., at 737.

The Civil Aeronautics Board has recognized this "historical concept of embargo, namely, a 'unilateral declaration' by an air carrier of its common law right to refuse to carry property for a limited period due to circumstances beyond its control." CAB Notice EDR-214, 36 F.R. 19914 (October 13, 1971). The Board has in fact established regulations which set forth the proper basis for an embargo by an air carrier, including "lack of facilities or personnel, or because it is required to give preference or precedence to other traffic entitled to priority, or because of other compelling reasons not within the control of the carrier," 14 CFR § 228.1, and which

provide for specific forms of notice to be given to the Board, to shippers, and the public. Regulation ER-789, 38 F.R. 4241 (February 12, 1973), amending 14 CFR Part 228.

Nothing in the Board's regulations, however, provides expressly for the rejection of embargo notices duly filed by the carriers. The Board, however, purports to do just that with respect to the hazardous materials embargoes on the grounds that they are not within the "embrace" of the embargo regulations. Order 75-2-127, p. 3. It is clear on analysis, notwithstanding the Board's suddenly restricted view of the carriers' rights, that their embargoes are indeed within the scope of the Board's Part 228 regulation. They obviously restrict acceptance of identified classes of property which the carriers are temporarily unable to transport as requested. Moreover the reasons given for this inability relate to (a) the lack of facilities for safe handling of dangerous cargoes, especially in light of the carriers' new responsibilities under the amended FAA Part 103 regulations, and the greater recognition of the volume and the nature of hazardous materials being tendered to the carriers; (b) the lack of personnel, given the pilots' nation-wide "STOP Program," cf. Chicago & N.W.Ry. Co., supra; (c) the statutory preference for passenger safety under the Aviation Act, in light of the dangers of intermixing hazardous cargoes on the same flights with passengers; and (d) "other compelling reasons not within the control of the carrier," namely the nation-wide emergency situation arising from the lack of effective regulatory controls over the packing, labelling and shipment of hazardous materials.

Certainly, the carrier embargoes fit within the four corners of the Board's regulations, and they cannot be rejected here for any technical noncompliance.

Assuming that the CAB has authority to set aside or annul an improper embargo and to require the provision of service, it does not follow that the Board may take such action by fiat as it did here, without the benefit of adjudicatory procedures to ascertain the relevant facts. Indeed it is clear that the Board does not have plenary power over the airlines, and its authority to compel action or to prescribe airline rates or practices is conditional upon the observance of specific procedural requirements. Moss v. CAB, 430 F.2d 891 (D.C. Cir. 1970).

In Regulation ER-789, amending the embargo rules, the CAB made clear that any interested person could file a formal complaint against an unjustified embargo pursuant to its rules of practice, 14 CFR § 302.201, or lodge an informal complaint with its Office of Consumer Affairs. 38 F.R. 4242. The Board's powers to deal with an improper embargo, either on its own initiative or upon complaint by a third party, are those set forth in section 1002(c) or (d) of the Aviation Act, 49 U.S.C. § 1482(c), (d). It is clear, we believe, that the Board has not rejected the carriers' hazardous materials embargoes for any mere technical noncompliance with the regulations, and that its action has the purpose and effect of requiring the carriers to abandon those embargoes and carry such hazardous materials as may be

tendered for shipment. Thus, whether the rejection be viewed as an order commanding compliance with the Aviation Act, including the requirement for carriers to provide adequate service under section 404, 49 U.S.C. § 1374, or as a "prescription" of air carrier practices, in either case such an order may not be entered except after public notice and the opportunitiy for hearing--neither of which were afforded here. This procedural defect, we submit, is fatal to the validity of Order 75-2-127. Moss v. CAB, supra.

CONCLUSION

For the reasons set forth herein, we support the position of petitioners and urge this court to set aside Order 75-2-127, and to enjoin the CAB from any further improper interference with the independent safety judgments of air carriers, and their right not to accept property for shipment which they consider themselves unable to perform safely.

Respectfully submitted,

Reuben B. Robertson III

Reuben B. Robertson III

2000 P Street, N.W., Suite 700
Washington, D.C. 20036
(202) 785-3704

Attorney for Aviation Consumer Action Project, et al., Amici Curiae

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CERTIFICATE OF SERVICE

The undersigned counsel for Aviation Consumer Action Project, James Wm. Noll, Margaret Sonja Noll, Patricia Kennedy, and Ralph Nader, amici curiae, hereby certify that copies of their brief in support of petitioners have been duly served by first class mail, postage prepaid, this 8th day of April, 1975, upon:

Daniel M. Katz, Esq.
1625 Massachusetts Ave.NW
Washington, DC 20036

Glen M. Bendixsen, Esq.
Associate General Counsel
Civil Aeronautics Board
Washington, DC 20428

John F. Shea, III, Esq.
Assistant Attorney General,
State of New York
Two World Trade Center
New York, NY 10047

Reuben B. Robertson III

Reuben B. Robertson, III
2000 P Street, NW, Suite 700
Washington, DC 20036
(202) 785-3704